No. 15582

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,

Appellee.

Appeal from the United States District Court for the District of Oregon

PETITION FOR REHEARING

ROY F. SHIELDS,
JOSEPH G. BERKSHIRE,
HOWARD E. ROOS,
727 Pittock Block
Portland 5, Oregon
Attorneys for Appellant

MARTIN P. GALLAGHER
Ontario, Oregon
Attorney for Appellees

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 15582

UNION PACIFIC RAILROAD COMPANY,
a corporation,

Appellant,

vs.

ORE-IDA POTATO PRODUCTS, INC.,
a corporation,

Appellee.

Appeal from the United States District Court for the District of Oregon

---

PETITION FOR REHEARING

The Appellee respectfully petitions the Court for a rehearing of this cause and submits that the Court erred in the following particulars:

I

In re-examining the question of fact as to whether or not the product was a cooked vegetable.

II

In failing to accord the proper weight to the Findings of Fact on a contested issue.

III

In finding as a matter of fact the product was a cooked food.

IV

In finding that the french fried potatoes fit the description set out in Item 4600.

V

In finding that food is that partially cooked is "cooked food" within the meaning of Item 4600.

VI

In failing to give to Appellee the benefit of the rule that if the shipment could be included in more than one tariff designation it would be proper to select the item more specifically applicable to the product being transported.

VII

In failing to give to Appellee the benefit of the rule if there were two tariff descriptions equally appropriate the shipper would be entitled to the lower rate.

Our basic position is that the lower court necessarily had to make a finding of fact. There is only one fact that needs to be found and that is whether french fried

potatoes are a frozen fresh vegetable or whether they are a cooked food. If the lower court makes a finding of fact on that question on substantial and satisfactory evidence, then such finding is binding upon the appellate court and the appellate court should not examine questions of fact that have once been determined.

The Appellee feels that this is not primarily a question of interpretation of tariffs. The tariff needs no interpretation after a question of fact is determined. It is obvious that the application of the proper tariff is clear when the fact is found. If the Court finds as a matter of fact that the french fried potatoes are a frozen fresh vegetable then it is obvious that Item 4715 applies. If the Court finds that the french fried potatoes are a cooked food then it is obvious that Item 4600 is applicable. The Court in its opinion sets out the steps involved in the process and concludes from them that the product results in a cooked food and that it is not a frozen vegetable. On the other hand the lower court took the same facts and arrived at the conclusion that it was a frozen fresh vegetable and not a cooked food. The Appellant is necessarily asking that this court take the same testimony and find a different fact.

We feel that the finding is not a conclusion of law but rather a finding of fact.

We think this case can be distinguished from West Coast Products Corp. vs Southern Pacific Co. (9 Cir) 226 Fed. (2) 830. There the Court reviewed a process but they did not have a clear cut question of fact involved. They were construing the product in relation

to tariffs whereas in this case we have the undisputed testimony and from that a certain fact emerges, i.e., whether it is a frozen fresh vegetable or a cooked food.

The closest that the court can come to finding this to be classified under Item 4600 is to find that the product is partially cooked.

If it is partially cooked and partially raw, then it would fit either of the two classifications and the shipper would be entitled to the lower classification.

The question of construction of tariff provisions only comes into play after the question of fact is determined. If the facts are determined then of course Great Northern Ry. Co. vs Merchants Elevator Co., 259 U. S. 285, 290 would apply. Then the construction of the tariff provision is a question of law and a simple one.

Respectfully submitted,
MARTIN P. GALLAGHER
Attorney for Appellee